No. 95-685

NOV 13 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC., and PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

—v.—

MAYOR AND CITY COUNCIL OF THE CITY OF BALTIMORE, *et. al.* ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF PETITIONERS

BURT NEUBORNE
(Counsel of Record)
40 Washington Square South
New York, New York 10012
(212) 998-6172

Counsel for Association of National Advertisers, Inc., as Amicus Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

Interest of *Amicus Curiae* 1

The Issues Raised by the Decisions of the Courts Below 1

Reasons for Granting the Writ 3

I. BALTIMORE HAS IMPERMISSIBLY USED A LEGITIMATE CONCERN FOR CHILDREN AS A PRETEXT TO IMPOSE CENSORSHIP ON THE ENTIRE COMMUNITY 3

II. THE FOURTH CIRCUIT FAILED TO SUBJECT THE FACTUAL UNDERPINNINGS OF BALTIMORE'S CENSORSHIP SCHEME TO RIGOROUS, INDEPENDENT JUDICIAL SCRUTINY .. 6

III. THE FOURTH CIRCUIT REFUSED TO CONSIDER WHETHER MORE NARROWLY TAILORED ALTERNATIVES WOULD ADVANCE BALTIMORE'S ASSERTED INTEREST IN PROTECTING CHILDREN WITHOUT MASSIVE CENSORSHIP. 8

Conclusion 9

TABLE OF AUTHORITIES

Cases	PAGE
Board of Trustees v. Fox, 492 U.S. 469 (1989)	3
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)	5
Butler v. Michigan, 352 U.S. 380 (1957)	4
City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505 (1993)	2, 7
Central Hudson Gas & Electric Corp. v. Pub. Svc. Comm'n, 447 U.S. 557 (1980)	7
Edenfield v. Fane, 113 S.Ct. 1792 (1993)	2, 7
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	4
Gitlow v. New York, 268 U.S. 652 (1925)	8
Ibanez v. Florida Dep't of Business & Professional Regulation, 114 S.Ct. 2084 (1994)	2, 7
Landmark Communications, Inc,. v. Virginia, 435 U.S. 829 (1978)	6
Peel v. Att'y Registration & Disc. Comm'n, 496 U.S. 91 (1990)	2, 3
R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992)	6
Rubin v. Coors Brewing Co., 115 S.Ct. 1585 (1995)	2, 5, 9
Sable Communications v. FCC, 492 U.S. 115 (1991)	*passim*
Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S.Ct. 501 (1991)	3,6
Turner Broadcasting System, Inc., v. FCC, 114 S.Ct. 2445 (1994)	6
Wisconsin v. Mitchell, 113 S.Ct. 1811 (1993)	7

Interest of *Amicus Curiae*

Pursuant to Supreme Court Rule 37.2, the Association of National Advertisers, Inc. (ANA) respectfully submits this brief *amicus curiae* in support of petitioners' application for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. All parties have consented to the filing of this brief. Letters of consent will be lodged with the clerk of the Court.

ANA is the industry's oldest trade association and the only organization exclusively dedicated to serving the interests of corporations that advertise regionally and nationally. ANA's membership is a cross-section of American industry, consisting of manufacturers, retailers and service providers. Representing more than 5,300 separate advertising entities, ANA's member companies market a kaleidescopic array of products and services to consumers and other businesses. As the nation's principal community of commercial speakers, ANA has long been committed to the advancement of commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace. ANA has appeared as *amicus curiae* in this Court in numerous cases involving commercial speech.

The Issues Raised by the Decisions of the Courts Below

ANA is mindful of the extraordinary nature of a brief *amicus curiae* at the certiorari stage. The issues raised by the petition in this case are, however, so critical to the continued viability of constitutionally protected commercial speech, that participation at the certiorari stage of this case appears appropriate. The decision of the Fourth Circuit upholding a ban on outdoor advertising of alcohol in much of the City of Baltimore raises three critical issues. First, the courts below declined to conduct an independent review of the claimed factual justification for Baltimore's massive exercise in cen-

sorship. Instead of the searching judicial review of the factual justification for censorship that is a hallmark of the modern First Amendment, the courts below, in disregard of the holdings of this Court, asked merely whether the Baltimore City Council had a rational basis for its decision to impose massive censorship. *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1510, n.13 (1993); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S.Ct. 2084 (1994).

Second, the courts below refused to consider whether it was actually necessary for Baltimore to engage in massive censorship of truthful speech aimed at adults in order to advance its ostensible purpose of reducing underage consumption of alcohol. For example, the Baltimore City Council did not seriously consider whether vigorous law enforcement and increased education would adequately advance its governmental interests, without a need for massive censorship. *Amicus* believes that Baltimore's failure to have seriously considered non-censorship approaches to the problem renders the decision to invoke censorship constitutionally suspect. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995). Even if, however, one assumes that resort to some form of speech regulation was permissible, Baltimore was under an obligation to consider more narrowly tailored regulations that would avoid massive censorship of adults. *Peel v. Att'y Registration & Disc. Comm'n*, 496 U.S. 91 (1990).

Third, Baltimore used its legitimate concern with children as a device to leverage itself into a position to censor vast quantities of material aimed at adults. When, as here, concern for children is used as a stalking horse to justify widespread censorship of material designed for adults, the society risks diluting the level of discourse to the lowest common denominator. *Sable Communications v. FCC*, 492 U.S. 115 (1991).

Reasons for Granting the Writ

I.

BALTIMORE HAS IMPERMISSIBLY USED A LEGITIMATE CONCERN FOR CHILDREN AS A PRETEXT TO IMPOSE CENSORSHIP ON THE ENTIRE COMMUNITY

It is, *amicus* suggests, no coincidence that significant contemporary debates about censorship revolve around the question of how to protect children without sacrificing speech aimed at adults. Whether one is concerned with sexually explicit speech on the Internet, violence on television, or billboards in Baltimore, the First Amendment challenge is the same—to assure that legitimate concern for children does not ripen into a blueprint for the widespread censorship of adults.

Unfortunately, in this case, Baltimore has used an ostensible desire to reduce underage consumption of alcohol as a thinly-disguised device to impose widespread censorship on truthful speech aimed at adults. *Sable Communications v. FCC*, 492 U.S. 115 (1991). Although Baltimore's sole asserted interest in censorship is a desire to protect young people, Baltimore's ban, viewed as device to protect children, is both radically over- and under-inclusive, casting serious doubt on its true purpose.

Baltimore's scheme is overinclusive because the City has made virtually no effort to "narrowly tailor" its ban to children. Instead, the City seeks to use concern for children as a transparent device to censor what adults may read.

While the requirement of "narrow tailoring" in a commercial speech context does not require mechanical invalidation of a regulation merely because other alternatives may exist, *Board of Trustees v. Fox*, 492 U.S. 469 (1989), it does require a careful effort to avoid unnecessary censorship. *Peel v. Att'y Registration & Disc. Comm'n*, 496 U.S. 91 (1990).

Nowhere is that careful effort more important than when the volatile issue of the welfare of children is the asserted justification for censorship of speech aimed at adults. While *amicus* does not believe that persuasive data exists identifying outdoor advertising as a material cause of underage drinking[1], even if one assumes for the sake of argument that some children might be unduly influenced by certain outdoor advertisements, no basis exists to ban all off-site outdoor advertisements for alcohol in Baltimore's residential neighborhoods.

This Court has repeatedly invalidated similar efforts to impose the standards of children on what adults may read. In *Sable Communications v. FCC*, 492 U.S. 115 (1991), for example, Congress banned so-called "dial-a-porn" services used by adults in order to shield children from the morally degrading material. This Court unanimously invalidated the ban, ruling that Congress had failed to demonstrate that a flat ban on lawful speech directed to adults was necessary to protect children.[2]

The Court's refusal in *Sable Communications* to permit a legitimate concern with children to be parlayed into a full-blown device to censor adults was not new law. In *Butler v. Michigan*, 352 U.S. 380 (1957), a unanimous Supreme Court invalidated a Michigan statute that forbade the public distribution of books, pictures and movies potentially harmful to minors. Justice Frankfurter, in invalidating the law, ruled that

---

[1] In 1985, the Federal Trade Commission rejected the identical argument, fnding that no persuasive data linked advertising to underage abuse of alcohol. The FTC study, among others, is described in the Joint Appendix submitted to the Fourth Circuit. JA 175-76; 1177-78.

[2] In *Sable Communications*, the Court distinguished its "narrow" holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) upholding a ban on offensive radio broadcasts during the afternoon, noting that *Pacifica* imposed a mere "time, place or manner" restriction, as opposed to a flat ban on the speech. In addition, *Pacifica* was explicitly based on the claimed existence of enhanced regulatory power over the broadcast media.

it was "not reasonably restricted to the evil with which it is said to deal", *id* at 388, because it reduced adults to reading only that which is fit for children. Similarly, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court struck down a postal ban on unsolicited birth control advertisements directed to the home, holding that concern for children could not justify a broad-based ban on material directed to adults.

As the Court recognized in *Sable Communications*, unless would-be censors are held to a rigorous standard of narrow tailoring in child-protective settings, the temptation to use children as a stalking horse for censorship of adults will become overwhelming. That is precisely what happened in this case.

The inexplicable underinclusiveness of Baltimore's censorship scheme reinforces the suspicion that concern with children is being used as a cover for censorship of speech aimed at adults. A censorship scheme genuinely designed to protect children simply would not exempt advertisements in Camden Yards and Memorial Stadium, or on public transportation.[3] The internal contradictions of a scheme that claims to protect children by exempting advertisements in ballparks, in downtown shopping malls, and on the buses children ride to school makes it all but impossible to take Baltimore's child protection rationale seriously. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995).[4]

---

[3] In order to ban advertisements of lawful products from any public place, a would-be censor must satisfy the stringent requirements of the third prong of the *Central Hudson* test. As *amicus* has noted, no reliable data exists linking truthful advertising to unlawful behavior by children. Thus, *amicus* believes that efforts to ban controversial advertisements from sports stadia or public transportation would violate the First Amendment.

[4] The exemption of state-run ballparks and public transit facilities from the Maryland enabling law raises yet another constitutional issue, since the censorship scheme discriminates between governmental and non-governmental speakers. Under Baltimore's scheme, governmental

II.

THE FOURTH CIRCUIT FAILED TO SUBJECT THE FACTUAL UNDERPINNINGS OF BALTIMORE'S CENSORSHIP SCHEME TO RIGOROUS, INDEPENDENT JUDICIAL SCRUTINY

The hallmark of modern First Amendment protection is a rigorous, independent review by the judiciary of the factual underpinnings of any decision to censor protected speech. Eg. *Turner Broadcasting System, Inc., v. FCC,* 114 S.Ct. 2445 (1994); *Landmark Communications, Inc,. v. Virginia,* 435 U.S. 829 (1978). As this Court recently held in *Turner Broadcasting*, the judiciary is obliged to conduct an independent review of the legislature's factual basis for censorship in order to assure that First Amendment rights are adequately preserved, even when such an independent review brings the judiciary into conflict with Congress.

Unfortunately, the court below abdicated its responsibility to look carefully at the factual basis for Baltimore's massive exercise in censorship, claiming that it lacked power to review so-called "legislative facts" "found" by the Baltimore City Council after one day of public hearings. 63 F.3d at 1311-12. Instead, the court below asked merely whether the Baltimore City Council could have held a rational belief that its censorship scheme had a "logical nexus" to the problem of underage drinking. *Id* at 1313-1314.

But such an unduly deferential "rational basis" standard confuses judicial review of censorship of speech with judicial review of the regulation of behavior and has been explicitly

---

entities are permitted to continue to derive revenue from beverage advertising at the ballpark and on public transportation, but private speakers are flatly banned. Baltimore cannot create a government monopoly over certain categories of advertising by outlawing the bulk of private competition. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501 (1991); *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992).

rejected by this Court in commercial speech cases. See *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1510, n.13 (explicitly rejecting rational basis review in commercial speech settings); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S.Ct. 2084 (1994). Ordinarily, the majority may regulate behavior in the rational hope that regulatory activity may bring about a desired social result. *Wisconsin v. Mitchell*, 113 S.Ct. 1811 (1993). Where, however, constitutionally protected speech (truthful outdoor advertising aimed at adults) is the target of a censor because of content-based allegations that its message leads to undesirable behavior (underage drinking), the majority must do more than assert a rational hope that sweeping censorship of adults will reduce underage misbehavior., 113 S.Ct. 1792 (1993) *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S.Ct. 2084 (1994); *Central Hudson Gas & Electric Corp. v. Pub. Svc. Comm'n*, 447 U.S. 557 (1980).

Especially where, as here, the volatile issue of protection of children is asserted as the sole justification for content-based censorship of a particular message intended for adults, government must do more than merely assert a rational basis for censorship. A would-be censor must demonstrate that censorship of adults is genuinely necessary to protect children before reducing public discourse to the level of the sandbox. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). Thus, when legislative assertions of fact underlie a decision to censor, due regard for principles of separation of powers require a reviewing court to make an independent assessment of the factual sufficiency of the case for censorship.

That is the critical lesson of the Holmes/Brandeis refusal to accept the "bad tendency" test in First Amendment cases. There is, at bottom, absolutely no difference between the Fourth Circuit's formulation of its standard of review in this case and the "bad tendency" test rejected by Justices Holmes

and Brandeis in *Gitlow v. New York*, 268 U.S. 652 (1925). Unfortunately, while both the Baltimore City Council and the courts below purported to apply the rigorous First Amendment "directly and materially advance" test, they actually resurrected the discredited "bad tendency" test as the only way to uphold the Baltimore speech ban.

III.

THE FOURTH CIRCUIT REFUSED TO CONSIDER WHETHER MORE NARROWLY TAILORED ALTERNATIVES WOULD ADVANCE BALTIMORE'S ASSERTED INTEREST IN PROTECTING CHILDREN WITHOUT MASSIVE CENSORSHIP

The Fourth Circuit recognized a duty to consider whether less drastic alternatives existed to Baltimore's censorship scheme. 63 F.3d at 1316. The court below then proceeded to refuse to consider two sets of less drastic alternatives.

The court below explicitly declined to consider whether the non-censorship options of vigorous law enforcement and increased community education were adequate alternatives, making it unnecessary to resort to censorship at all. Moreover, the court then failed to consider whether less drastic speech regulations such as: (1) geographical restrictions focusing on signs within 500 feet of schools and playgrounds; or (2) density restrictions limiting the number of outdoor signs in a given neighborhood would be sufficient to advance Baltimore's interest in reducing underage consumption of alcohol.

Amicus believes that no effort to deal with underage drinking can succeed without a serious commitment to law enforcement and community education. Baltimore's failure to explore such non-censorship alternatives renders a resort to censorship as a substitute for law enforcement and community education unconstitutional. Moreover, whatever one's view of the relative efficacy of censorship in dealing with underage drink-

ing, it is clear that numerous alternatives exist to a ban on outdoor advertising except in commercial areas. For example, many communities have experimented with bans on signs within 500 feet of schools and playgrounds. Others have considered density regulations limiting the concentration of signs. *Amicus* believes that serious questions exist about whether even such narrowly tailored bans would satisfy the third prong of the *Central Hudson* test. Unfortunately, neither the Baltimore City Council, nor the courts below, made an effort to determine whether such obvious alternatives rendered it unnecessary to engage in massive censorship of adults. The requirement of narrow tailoring that is the core of the fourth prong of the *Central Hudson* requires, at a minimum, that Baltimore be required to demonstrate why the existence of such obvious alternatives to widespread censorship were ignored. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995).

Conclusion

The petition for certiorari herein should be granted.

Dated: November 10, 1995
New York, New York

Respectfully submitted,

BURT NEUBORNE
(*Counsel of Record*)
40 Washington Square South
New York, New York 10012
(212) 998-6172

Attorney for ANA